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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

On Petition For a Writ of Certiorari To The United States Circuit Court of Appeals For The Second Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The ruling of the District Court does not appear in the official reports, but is set out at R. 18-28. The decision of the Circuit Court of Appeals is reported in 122 F. 2d 288 (R. 33-39). The Memorandum by the Circuit Court of Appeals denying a petition for rehearing will be found at R. 58.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 18, 1941 (R. 33) and a petition for rehearing

was denied on August 15, 1941 (R. 58). The petition for a writ of certiorari was filed November 15, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether it was error for the Circuit Court of Appeals to hold the publication to be libelous per se under the applicable New York Authorities.
2. Whether the article was, under the New York authorities, fair comment and criticism to the extent that respondent was not entitled to a trial on the merits.
3. Whether the constitutional right of a free press was in any wise impaired by the Circuit Court of Appeals decision.

Statement.

On December 13, 1939, the respondent, a duly elected member of the Congress of the United States from the State of Ohio, filed his complaint for damages for libel against the petitioner, growing out of the publication on December 23, 1938, of an article under the caption "*Washington Daily Merry-Go-Round*" (R. 2-5). By his bill of particulars respondent set forth the entire article published by petitioner and specified the parts thereof which were false and defamatory (R. 13-16). Where persons other than respondent were named in the article, the allegation of falsity was restricted to the respondent (R. 16).

Respondent pleaded general damages alleging that by reason of the libelous publication and its wide circulation, he had been greatly injured in his good name, fame and reputation, in the conduct and execution of his official duties as a duly elected representative in Congress, and in pursuance of his profession as a practicing attorney, in his standing in the community wherein he resides, and in the

high regard, respect, confidence and esteem he had thereto enjoyed among his associates both in the Congress and in the legal fraternity and elsewhere (R. 4-5).

The petitioner's answer contained a general denial, defenses of truth and fair comment and pleas in mitigation of damages (R. 5-9). Thereafter, petitioner filed a motion for judgment on the pleadings (R. 17).

In granting the motion, the District Judge, proceeding on the theory that the article was not actionable per se, clearly erred at the outset by misinterpreting the plain import of the words ascribed to the respondent, viz: "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States" (R. 4). The lower court held that the statement charged Congressman Sweeney with opposing the appointment of Mr. Freed to a federal judicial office merely because the latter was "a foreign born Jew" (R. 20). That this construction was plainly erroneous may readily be seen simply by substituting the noun for the pronoun in the second clause, "• • • and a *Jew* not born in the United States." Hence, the true import is revealed, the respondent was alleged to be opposed to Freed because he was a Jew and a *Jew* not born in the United States.

The District Court, while denouncing bigotry,—

> "That there are such prejudices is greatly to be deplored. That there should be the fullest tolerance can not be questioned." (R. 28),

at the same time proceeding to extend judicial sanction to such attacks when falsely made on a public official, and granted petitioner's motion on the grounds that the article did not hold respondent up to public scorn, contempt and ridicule (R. 28).

Judge Clark, dissenting from the majority, (R. 37), seems to be constrained to the view that a "special rule" exists in New York which extends judicial license to the libeler in practically all matters affecting public officials. That such a view is totally erroneous, when applied to the facts in the

instant case, may readily be seen by even a cursory examination of the decisions in *Tanger* v. *Crowley Pub. Corp.*, 240 App. Div. 203; *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. 200; and in *Hills* v. *Press Co.*, 122 Misc. 212, aff'd. 214 App. Div. 752, which are cited as authority in the dissent (R. 37). In all three of these decisions, the rule of fair comment and criticism was invoked since the alleged libels were clearly within the privileged class. The articles were genuine criticism based upon *official acts uncontrovertibly true*, whereas, in the instant case, respondent by his bill of particulars, pleaded the *falsity* of the disgraceful *acts* charged to him (R. 16).

Furthermore, in erroneously misconstruing the article to be comment and criticism rather than false statements of the official *acts*, the dissenting Judge opines the rationale of the decision to be dangerous, in holding that comment leading an appreciable number of the public to hate and hold in contempt is, libelous per se (R. 38). The fallaciousness of this is increasingly clear when it is noted that the decision of the majority did not turn on the question whether the publication was comment and criticism, rather were the words at once recognized as *false statements of fact* manifestly not within the rule of fair comment and honest criticism, and in holding the publication to be libelous per se the Court of Appeals correctly applied the doctrine enunciated in *Peck* v. *Tribune Co.*, 214 U. S. 195.*

In addition, the dissenting opinion erroneously relies on the "persuasive reasoning of decisions in other jurisdic-

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* Justice Holmes, speaking for the Court in the *Peck* case, said:

> "Liability is not a question of a majority vote, * * * obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known to all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm * * *." *Peck* v. *Tribune Co., supra.*

tions to sustain the minority view, (R. 38), apparently ignoring the doctrine laid down by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The Circuit Court of Appeals, by a majority opinion, reversed the decision of the District Court and remanded the cause for trial (R. 37). Reviewing so much of the background of the case as was pertinent to a decision and noting particularly that litigation, involving substantially the same article had been commenced in other jurisdictions with results both favorable and unfavorable to the respondent, the Circuit Court stated that decisions in other jurisdictions were not only conflicting, but were inconclusive for a decision in that Court, since the case must turn on the application of the libel law of the State of New York, citing *Erie Railroad* v. *Tompkins,* 304 U. S. 64. (R. 34-35).

Judge Chase, speaking for the majority, and with Holmes-like clarity and brevity, cited several well established principles enunciated so often by the New York Court of Appeals as to be axiomatic. He reviewed the definition for libel found in two of the leading cases on the subject in New York, viz: *Kimmerle* v. *N. Y. Evening Journal, Inc.,* 262 N. Y. 99, and *Sydney* v. *MacFadden Newspaper Pub. Corp.,* 242 N. Y. 208, and also cited the fact that the definition found in both cases was in general accord with that found in the *Restatement of the Law of Torts, Sec. 559.* (R. 35).

The Court concluded that "the test is whether right-thinking persons would be reasonably expected to be induced by the publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured" in one or more of the respects set forth in the definition cited in the *Kimmerle* and *Sydney* cases defining civil libel as it has been consistently defined by the New York Court of Appeals. (R. 35-36). See cases *infra,* pp. 9-10.

The majority decision also recognized the well established principle that a false statement to be libelous per se

need not charge a violation of law, and the accusations of disgraceful *acts falsely* made of a public official which would lead right-thinking people to believe him unworthy of public trust and confidence are actionable per se, citing *Bennet* v. *Commercial Advertising Assoc.*, 230 N. Y. 125. (R. 36).*

Acknowledging, of course, the charges imputed to respondent would hold him to the acclaim of those individuals and groups devoted to the cause of religious and racial bigotry, Judge Chase held that the false publication need not entail universal hatred, that it is enough if a noticeable part of the reading public hold the accused up to hatred, scorn or contempt, citing *Peck* v. *Tribune Co.*, 214 U. S. 195; *Restatement, Torts, Sec. 559 (e)*, (R. 36).

Clearing away all doubt as to the meaning of the words ascribed to the respondent, Judge Chase said: "The context does not fairly permit reading the language as meaning the foreign birth of Freed the all sufficient cause of the plaintiff's opposition to his appointment, but rather the contrary by stressing the fact that he was a Jew whose foreign birth apparently but gave an additional basis for plaintiff's opposition." (R. 35).

In addition, Judge Chase also took into consideration the time and place of the publication, and the *current effect* of the publication: See *Levy* v. *Gelber*, 175 Misc. 746 (1941).

> "And certainly the time and place of publication must be given due weight and effect. This plaintiff by being accused of trying to deprive a man of an appoint-

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* Petitioner's brief, (page 6n), apparently considers that Judge Chase made a fatal error in citing as authority the *Bennet* case for the statement: "when made of a public official, false accusations which may lead right-thinking people to believe him unworthy of public trust and confidence are libelous per se," whereas, the *Bennet* decision actually read, "unworthy of public trust and a betrayer of civic confidence." In the first place, Judge Chase did not purport to quote from the decision in the *Bennet* case, and in the second place, it would be "hair splitting" indeed, to contend that the proposition as stated by Judge Chase and as stated in the *Bennet* opinion is not synonymous.

ment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increase i respect in some quarters; and in others, where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are greatly offended by the narrow-minded injustice of the bigots who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of such statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers. Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.

"Moreover, in places where Jews make up a sizeable portion of the population, as they are known to do in part of the territory in which it is alleged that the defendant's newspaper circulated when the publication was made, it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew merely because he is a Jew whether born in this country or not. A majority of the court is of the opinion that the complaint is sufficient under the principles above stated and that the defendant should be required to meet it on the merits.

"Order reversed and cause remanded for trial."

Incorporated in the transcript of the record, as "Appendix A" (R. 13-15), petitioner purports to set forth the "status of Merry-Go-Round Suits."

Obviously, this gratuitous resumé of litigation in jurisdictions other than New York, and accordingly not governed by the law of libel as it exists in New York, is in no way pertinent to a decision on this petition. *Erie Railroad* v. *Tompkins,* 304 U. S. 64.

Nevertheless, the respondent finds it incumbent to point out at least a few of the statements which are not only misleading, but some of which are absolute misstatements of fact.

Petitioner sets forth "one case pending" in the State of Washington (R. 53). The respondent has no case pending and has never instituted suit for damages in the State of Washington arising out of this publication or for any other matter.

The several cases cited as "dismissed" by Judge Hopkins of the Kansas District Court, were dismissed *without prejudice,* due to the inability of Mr. Sweeney to be personally present for the trial. The quality of the libelous words was not in issue as the Court had previously denied motions by the defendants to dismiss for failure to state a cause of action, and defendants' motions for judgment on the pleadings.

In Ohio, cases filed by Congressman Sweeney were dismissed, following the Court's decision in Akron Beacon Journal suit, wherein it was held the publication was not libelous per se because it did not charge a violation of the moral or criminal code. (Obviously not the law in New York, see cases *infra* p. 11).

The suit against the Greenwood Index-Journal (South Carolina) was dismissed because of a technical error in naming the defendant, in the complaint. The merits of the controversy was in no way in issue.

In Tennessee the action against the Chattanooga Free Press was discontinued on motion by the plaintiff, pursuant to agreement between the parties.

The suit against the Newport News Daily Press (Virginia) was dismissed by agreement of the parties and the action against the Suffolk News-Herald (Virginia) was

dismissed for lack of prosecution due to the inability of Congressman Sweeney to be present on the trial date. In neither case were the merits of the libel in issue. In the last named suit in Virginia—Martinsville Daily Bulletin—cited as "dismissed," the article was entirely incoherent, due to a mistake of the typesetter in jumbling the type. Hence, the article being unintelligible, it could not be libelous.

Argument.

The Publication is Libelous Per Se.

The determinative issue herein is whether the Court of Appeals erred in holding the publication to be libelous per se, under the applicable New York Authorities. The article being published in New York, the law of that State is controlling. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

And, in ascertaining the libeler's liability the *same principles* apply to a libel of a public officer or a candidate for office, as to libels of private individuals, unless the statements fall within the strictly confined limits of fair and honest criticism. *Cartright* v. *Anderson,* 208 App. Div. 1.

An article is libelous per se when it tends to expose the person to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or tends to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society, *in any one or more of these respects. Dall* v. *Time, Inc.,* 252 App. Div. 637, aff'd. 278 N. Y. 635; *Kimmerle* v. *New York Evening Journal, Inc.,* 262 N. Y. 99; *Sydney* v. *MacFadden Newspaper Pub. Corp.,* 242 N. Y. 208; *Bennet* v. *Commercial Advertiser Assn.,* 230 N. Y. 125; *Triggs* v. *Sun Printing & Pub. Assn.,* 179 N. Y. 144; *Morey* v. *Morning Journal Assn.,* 123 N. Y. 207; *Morrison* v. *Smith,* 177 N. Y. 366; *Gates* v. *New York Recorder Co.,* 155 N. Y. 288; *Mattice* v. *Wilcox,* 147 N. Y. 624; *Moore* v. *Francis,* 121 N. Y. 199; *Bergman* v. *Jones,* 94 N. Y. 51; *MacFadden* v. *Morning Journal Assn.,*

28 App. Div. 508; *Shelby* v. *Sun Printing & Pub. Assn.*, 38 Hun. 474, aff'd. 109 N. Y. 611; *Cooper* v. *Greeley*, 1 Denio. 347; *Root* v. *King*, 7 Cow. 613; *Van Ness* v. *Hamilton*, 19 Johns. 349; *Steele* v. *Southwick*, 9 Johns. 214; *Riggs* v. *Denniston*, 3 Johns Cases 198.

The words expose him to hatred, contempt, ridicule, etc., are merely expressive as to the manner in which the reputation is injured, but, the question, is, whether the publication tends to lower him in the opinion of men whose standard of opinion the Court can properly recognize—*the essential is that reputation is injured. Cohen* v. *New York Times Co.*, 153 App. Div. 242.

Well in point is the case of *Sumner* v. *Liberty Pub. Corp.*, 240 App. Div. 118, (decided 1934). Sumner, a Deputy Commissioner of Internal Revenue, was charged with firing experienced employees and hiring new ones, who, it was charged, could not obtain work without "political drag." In holding the article to be libelous per se the Court ruled that the accusation that Sumner "accepted public office and proceeded to eliminate competent employees and to substitute political incompetents either at his own volition or at the dictation of others, charges the grossest kind of misfeasance and betrayal of his public trust."

Petitioner urges that the recent policy of the State has been to limit and restrict the causes for actions in libel. That such an assumption is utterly without merit is evidenced by the decision of the New York Court of Appeals in *Katapodis, et al.*, v. *Brooklyn Spectator, Inc.*, (decided November 27, 1941),——N. Y.——.

In the *Katapodis* case, defendant merely published false words tending to impute poverty to the plaintiffs and as such, the words could excite not ridicule, but sympathy. However, the Court, quoting from *Moffatt* v. *Cauldwell*, 3 Hu. (N. Y.) 26, (decided many years ago), stated:

> "But the proposition that ridicule is a *non sequitur* from such an imputation, is not universally true."

And, in affirming the Appellate Division, that the issue should be met on the merits the Court said:

> "The reason is that in libel the matter is defamatory not only if it brings a party into hatred, ridicule or contempt by asserting moral discredit upon his part, but also if it tends to make him shunned or avoided, although it imputes no moral turpitude to him." Citing *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures*, 50 T. L. R. 581; *Shelby* v. *Sun Printing & Pub. Assn.*, 109 N. Y. 611; *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99.

In determining whether a given publication has injured the person's reputation, the *current* effect of the statements is the decisive test. *Levy* v. *Gelber*, 175 Misc. 746, (decided 1941).

Applying these long established rules of the law of libel laid down by the Courts of New York, we have but to examine the publication to be immediately impressed by the correctness of the Circuit Court of Appeals decision.

The salient *facts* of the article are as follows:

Respondent is accused of being a part of "a hot behind-the-scenes fight" in Congress "to prevent the appointment of a Jewish judge;" the proposed appointee was Emerich Burt Freed who was "on the verge of being elevated to the U. S. District Court;" Congressman Sweeney's "violent opposition" had been aroused, and the "basis" of his opposition was the *fact* that "Freed is a Jew, and one not born in the United States;" that Freed had been brought to this country at an early age and had been for a number of years a naturalized citizen; the article, after reciting these *statements of fact*, concludes with the further *statement of fact* that, "Irate Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (R. 4).

As is readily seen the alleged reasons advanced for respondent's opposition were not that the candidate was unqualified for the office, but squarely on the point that he was a ***Jew and a Jew not born in this country.***

The inescapable import of the words is that respondent opposed the appointment of a man because he was a Jew. Whether the word "Jew" was intended by the authors to mean the race or the religion is unimportant. The term is unqualified and in ordinary common parlance is accepted to mean either race or religion, or, as the Jewish race and the Jewish religion are practically co-terminus, both. The natural and normal inference to be drawn from the fact that a man is opposed to the appointment of a person to office because that person is a Jew, is that such man is prejudiced against Jews, is bigoted, or dislikes Jews because they are Jews. It is to be noted that the opposition of Mr. Sweeney is said to be "violent" indicating that his prejudice, bigotry and dislike are proportionately severe.

In the decade 1930-1940, religion and racial hatred has set the world in flame, rivaling if not surpassing, the days of the martyrs and the Dark Ages. America has stood out to the world as one of the last bulwarks against intolerance and totalitarianism. Whatever mark Adolf Hitler may leave on the pages of history, no doubt he shall be longest remembered for his persecution of the Jews. It was his treatment of the Jews that caused him to be universally despised by the people of these United States. All of these events have led this country and its citizens to take measures to insure the continuance of the tolerance, which we have so long enjoyed. Those, like Father Coughlin, who have been accused of fostering religious and class hatred have been held in disgrace and contempt.

This recitation of existing conditions is not mere fanciful thinking. All are facts, and facts which the Circuit Court of Appeals properly considered (See *Sydney* v. *McFadden Newspaper Corp.*, 242 N. Y. 208, and cases therein cited), in correctly construing the publication to be libelous per se (R. 36-37).

It was at such a time as this that plaintiff was accused of being guilty of religious and racial intolerance.

Applying the test laid down by the Court of Appeals of New York State in the cases cited, *supra*, p. 9, what ef-

fect did this accusation have in the minds of ordinary, reasonable and right-thinking citizens? Certainly, it must have engendered the hatred and contempt of our Jewish citizens.

The Court must take judicial notice of the fact that Jews comprise an important and respectable part of most every community; that at least an important and respectable part of every community, other than Jews, consider it un-American to discriminate against a citizen of the United States because of his religion or his race; that Article 6, Section 3, *Constitution of the United States* provides:

> "No religious Test shall ever be required as a qualification to any Office or public Trust under the United States";*

and that Congressman Sweeney by his oath of office** is sworn to support and uphold the Constitution.

Undoubtedly it caused that vast majority of our citizens who are dedicated to the cause of tolerance of race and creed, to look upon Mr. Sweeney with contempt and shame. Such an accusation placed respondent in disgrace and deprived him of the confidence and friendly intercourse of his constituents. Such was the natural and normal tendency of this publication. This would follow even if Mr. Sweeney were but a private citizen. When spoken of him as a Congressman, as the article expressly does, the shame, hatred, degradation and disgrace is heightened and enhanced. There might be some excuse for respondent, as a private citizen, to oppose the appointment of a Jew, but Mr.

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*—With respect to "no religious test" for office, Justice Story, in his *Commentaries on the Constitution (5th Ed.), Sec. 1847*, says:

> "'The framers of the Constitution * * * knew that bigotry was unceasingly vigilant in its stratagems to secure to itself an exclusive ascendency over the human mind, and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those who doubted its dogmas or resisted its infallibility."

**—*House Rules and Manual, 77 Congress, Page 71, Sec. 229.*

Sweeney, as a representative of the people in Congress, sworn to represent all equally and fairly, can claim none.

There can be no question but that the Court of Appeals correctly held the article to be actionable per se and properly remanded the cause for trial on the merits.

Defense of Fair Comment and Honest Criticism, Presents a Jury Question.

The "special rule" which petitioner seeks to have applied in the instant case, is nothing more than the rule relating to fair comment and criticism.*

Under the New York authorities this privilege to comment upon matters of public concern is strictly limited to criticism, and is not applicable to *misstatements of fact. Briarcliff Lodge Hotel Inc.* v. *Citizen Sentinel Pub. Inc.*, 250 N. Y. 106; *Foley* v. *Press Pub. Co.*, 226 App. Div. 535; *Cohalan* v. *New York World-Telegram Corp.*, 172 Misc. 1061; *Sherman* v. *International Publications*, 214 App. Div. 437; *Hoey* v. *N. Y. Times Co.*, 138 App. Div. 149, Annotations, A. L. R. 412. In other words "the assertion of a *fact* is not a *comment* at all." *Bingham* v. *Gaynor*, 141 App. Div. 301, aff'd. 203 N. Y. 27.

The *known or admitted acts* of a public official are open to fair and honest criticism which is protected under qualified privilege. But the privilege is qualified:—

> "* * * because it does not extend beyond fair and honest comment and criticism. It is no protection to the writer if he therein makes *false statements* or unjustifiable inferences. In making such a communication the writer makes *statements of fact* at his peril, and, if the statements made therein are libelous and untrue, the fact that they are made about a public officer does not exempt the writer on the ground of privilege." *Bingham* v. *Gaynor*, 203 N. Y. 27. (Italics supplied).

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* The opinions of Judge Taft in *Post Publishing Co.* v. *Hallam*, 59 F. 539, and of Justice Holmes in *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, set forth with great clarity the overwhelming weight of authority both in this country and in England, the rule relating to privilege in matters of public concern. See also—23 *Harvard Law Review* 413.

To the same effect:

De Hoyos v. *Thornton*, 259 App. Div. 1;
Cartright v. *Anderson*, 208 App. Div. 1;
Lunn v. *Littaner*, 187 App. Div. 808;
Hoey v. *New York Times*, 138 App. Div. 149;
Hamilton v. *Eno*, 81 N. Y. 116;
Powers v. *Dubois*, 17 Wend. (N. Y.) 63;
Littlejohn v. *Greeley*, 13 Abb. Proc. (N. Y.) 41.

The following cases cited by petitioner as sustaining its point of view are obviously in no wise analagous to the facts herein.

In the case of *Tanzer* v. *Crowley Publishing Corporation*, 240 App. Div. 203, the article was clearly fair comment and criticism, based upon asserted facts. The Court in that case also remarked that "other alleged charges against plaintiff shown in the article are so indefinite and illusory as to fall short of compliance with the rule that provides that in order to constitute a libel, the charge must be clear and specific."

In the case of *Hill* v. *Press Company*, 122 Misc. 212, again the alleged libel was within the privileged class and was based on *facts truly stated.*

In the case of *Gardner* v. *Home Life Publishers*, 237 App. Div. 200, the alleged libel was also clearly within the privileged rule of fair comment and criticism and contained nothing of a vicious or disgraceful matter. In that case the statement alleged to be libelous read as follows: "Although City Comptroller Gardner (New Rochelle) announced to a Syracuse convention that New Rochelle would have no deficit in 1931, two days later the city was forced to obtain a rush loan on advanced tax certificates (at six per cent) to pay municipal salaries."

The article in each of these cases was genuine criticism based upon facts indisputably true and afford no precedent for the case at bar.

The utter fallacy of petitioner's contention lies in its marked failure to make any distinction whatsoever between comment and criticism based upon *facts truly stated,* and comment and criticism based upon *fictitious* statements of fact. (cases *supra,* p. 14.)

The accusations directed at respondent are manifestly *statements of fact* which clearly charge the commission of *acts* constitutiong not only misfeasance in office, but a betrayal of an electorate, which had placed him in office to represent them, fairly and honestly and without regard to race, creed or color.

In any event, whether or not the allegations in the publication, are allegations of fact or expressions of opinion, and, if expressions of opinion, (which we contend they are definitely not), whether such expressions are fairly warranted by the facts truly stated, are questions for the jury to decide under proper instructions from the trial judge. *Foley* v. *Press Pub. Co.,* 226 App. Div. 535 (involving an officer of the United States Navy). And in *Cohalen* v. *New York World-Telegram Corp.,* 172 Misc. 1061 (involving an official referee of the New York Supreme Court), the Court said:

> "The question of whether an editorial writer has exceeded fair criticism, is by the weight of modern appellate authorities, properly submitted to the jury, even where there may be a doubt." Citing *Kenna* v. *Daily Mirror, Inc.,* 250 App. Div. 625, aff'd. 276 N. Y. 483; *Triggs* v. *Sun Printing & Publishing Assn.,* 179 N. Y. 144, 154; *McInerney* v. *New York World Telegram Corp.,* 166 Misc. 266.

Here the charges directed at Congressman Sweeney are stated as *facts,* not as opinions of the publisher, and even if they were to be construed as opinions or criticism of Mr. Sweeney by the petitioner, there are no *facts* stated or referred to on which such opinion or criticism could be predicted, and, in any event, if there be such facts, it is for the jury to decide whether or not they are *truly stated.*

No Constitutional Question Involved.

Relying on statements found in a confusion of cases where the facts are in no way analogous to facts herein, petitioner vaguely contends that the decision of the Circuit Court of Appeals amounts to a restriction on the constitutional guarantees of a free press. Not one of the cited cases, purported to be in support of this proposition, involved a *civil suit for libel.* For the most part, the decisions petitioner relies on, concerned only the power of the several states in enacting statutes regulating picketing in labor disputes, and in one case (*Near* v. *Minnesota,* 283 U. S. 697) the action involved the constitutionality of a penal statute suppressing the publication of entire newspapers on the ground that they were a public nuisance. This Court rightly held the statute to be "the essence of censorship." However, it was also held by this Court in this same case that the common-law rules which subject a libeler to responsibility for the public offense, as well as the *private injury,* are not abolished by the constitutional protection of liberty of speech and of the press. *Near* v. *Minnesota, supra.* See also—*People* v. *Gitlow,* 234 N. Y. 132, aff'd. *Gitlow* v. *New York,* 268 U. S. 652.

Justice Story, in reference to the constitutional right of free speech and of the press, said:

> "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. * * * Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever without any prior restraint, so always that he does not injure any

> other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives for justifiable ends. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing depotism in its worst form." *Story's Commentaries on the Constitution, (5th Ed.), Sec. 1880.*

Freedom of the press has never been construed to authorize or sanction unbridled license to assassinate reputation, whether the reputation be that of a public official or a private citizen. The newspapers of the present day are not unduly guarded or restricted in making charges against public officials so long as they are *honestly* and *fairly* made. See *Post Pub. Co.* v. *Hallam* (C. C. A. 6th), 59 F. 539.*

We are fully in accord with petitioner's statement that "The decision is understandable as the instinctive reaction of men who hate religious bigotry with all their heart," and we respectfully submit that the accusations directed, in the publication, to Congressman Sweeney, are such as would make the normal decent and liberty-loving American citizen, hold him up to ridicule, contempt and shame and cause him to be shunned and avoided.

Petitioner contends that the public official, or the private citizen, has no legal recourse for libelous attacks attributing anti-racial and anti-religious *acts*, for the asserted reason that should the same public official, or the private in-

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* In the case of *Sweeney* v. *Joliet Printing Co.*, Civil No. 1204, in D. C. Northern Div. of Ill. (unreported), involving substantially the same article as here in issue, the Court said:

> "Freedom of the press does not mean irresponsibility for newspaper publishers. And that freedom will best be preserved through the exercise of care by the publishers in verifying slanderous statements before publishing them."

dividual, make similar attacks on Jews, Protestants, Catholics, etc., as entireties, the individuals of such groups would have no legal recourse. That such a proposition is obviously untenable is plainly indicated by the decision in *Levy* v. *Gelber*, 175 Misc. 746 (decided 1941). The individual's right to a good reputation, when he has done nothing to cause it to be otherwise, is a paramount one, ever to be protected, if true democracy is to survive. To hold otherwise would truly create "new law."

It is no answer that the minorities, ever championed in this bulwark of democracy, must snatch the "seige gun in the hands of bigots" and turn it, not on the libelers, but direct its lethal sting at the falsely accused individual. Weapons of this kind and character are dangerous instrumentalities not only in the hands of majorities or minorities, but, also in the hands of the libeler, who at a stroke, may wreck the good reputation of decent men.

Our judicial system provides ample safeguards for he who will fairly comment and honestly criticize and it even protects the publisher of libelous statements, if the *truth* is shown. Where the publication is so apparently libelous, as in the instant case, *truth* is not the unwary and illusive creature, but rather the vindicator, always present to uphold or denounce.

It is quite evident from the foregoing that the petitioner has no standing before this Court on the asserted ground that the constitutional guarantees of a free press has in any wise been impaired.

Conclusion.

The decision of the Circuit Court of Appeals is correct and not in conflict with any other applicable decisions, or in conflict with any of the provisions of the Constitution of the United States. Accordingly, the petition should be denied.

Respectfully submitted,

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